HIGH COURT OF UTTARAKHAND, AT NAINITAL

C-482 NO. 214 OF 2006

1. Anuj Kumar Sharma,
   S/o Sri Anand Prakash Sharma,
   R/o Village Bahadarpur Jat,
   P.S. Pathri, District- Haridwar.
2. Munish Kumar,
   S/o Sri Balbeer Saini,
   R/o 38 Bhagwati Puram,
   Kankhal, P.S. Kankhal,
   District -Haridwar. .....Applicants.

Vs.

1. State of Uttaranchal.
2. Judicial Magistrate, Haridwar.
3. Dr. Girish Kumar Saxena, S/o Sri T.B. Saxena,
   R/o Rishiul Govt. Ayurvedic College, Haridwar,
   P.S. Kotwali, District - Haridwar. .....Respondents.

Hon'ble Rajesh Tandon, J.

Heard Sri Navneet Kaushik, counsel for the applicants, A.G.A. for the respondent no. 1 and 2 and Sri Mahaveer Singh Tyagi, counsel for the respondent no. 3.

2. By the present application filed under Section 482 of the Code of Criminal Procedure, applicant has prayed for quashing the summoning order dated 31st January, 2006 in Case No. 1061/2005 Dr. Girish Kumar Vs. Anuj Kumar & another under Section 420 of Indian Penal Code and Section 138 of the Negotiable Instruments Act, P.S. Kotwali, District Haridwar.

3. Briefly stated, the complaint was filed by the respondent no. 3-Dr. Girish Kumar Saxena under Section 420, 406, 504, 506 IPC and 138 of the Negotiable Instruments Act stating therein that the complainant wanted to purchase some land and both the accused/applicants have agreed to sell the land measuring 3.25 bigha on a sum or Rs. 5,25,000/- at the rate of Rs. 1,65,000/- per bigha. They assured that they are owners of the land and have full right to execute the sale deed.

4. On the aforesaid assurance, the complainant on various dates have advanced a sum of Rs. 3,90,000/-, but the accused/applicants have failed to execute the agreement, however, they were promising to execute the same. According to the complaint, a total sum of Rs. 4,75,000 was given, but the agreement was not executed. Later on the complainant has come to know that the accused/applicants are not the owners of the land and they were delaying the execution on one pretext or the other.

5. Complainant has submitted that the has asked the accused/applicants for the refund of the amount and they have given the amount by way of cheque No. 055722 from Account No. 12752 to the extent of 4,75,000/- dated 30.04.2005 and the same was presented on 13.10.2005, but the same was returned as amount was fell short.

6. The complaint, therefore, on 27.10.2005 has sent a notice, which was received on 08.11.2005, but inspite of that, he has failed to pay the amount and

Abused the complainant, hence the present complaint was filed.

7. On filing the complaint, the statements under Sections 200 and 202 of the Code of Criminal Procedure were recorded and accordingly on the basis of the statements of the parties, on 31.01.2006 the applicants were required to appear.

8. A counter affidavit has been filed on behalf of the complainant and in paragraphs 11 and 13, it has been stated as under:

> "11. that the contents of paragraph No. 11 of the criminal misc. application is not admitted. Present applicants issued a cheque no. 055722 of rupees 4,75,000/- of Central Bank of India Haridwar in favour of deponent as deponent has paid to then rupees 4,75,000/- to purchase a land situated in village Badhedi Rajputan from the applicants. Deponent and Dr. S.P. Vashisth have never agreed with applicants to sell any plot situated at Shivlok Colonyand Subham Vihar Colony and notice dated 25-10-2005 was given only to colour the story concocted by applicants.
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> 13. That the contents of paragraph No. 13 of aforesaid criminal misc. application is not admitted as stated complaint case no. 1065/2005 Anuj Kumar V/s Girish Saxena U/s 420/ 120-B I.P.C. has been filed by applicant No. 1 only to pressurize the deponent as deponent is a doctor in a Government Medical College at Haridwar."

9. From the perusal of the complaint and the statements made under Section 200 and 202 of the Code of Criminal Procedure, it does not appear that any case for quashing the complaint is made out. The case of the

applicants is not covered by any of the clauses either of *Joginder Singh* (1994) SCC 260 or *State of Haryana v. Bjanan Lal 1992 Supp (1) SCC 335* as prima facie the complaint shows that the accused/applicants have promised the respondent no. 3 to execute the sale deed of which they were not the owners and further the cheque was issued, which could not be encashed and as such no interference is required in proceedings of Section 482 of the Code of Criminal Procedure.

10. In ***Medical Chemicals and Pharma (P) Ltd. v. Biological E. Ltd. and others (2003) 3 SCC 269,*** the Apex Court has been observed as under:

> "9. *The complaint also alleges an offence said to have been committed under Section 420 IPC which reads as below:*
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> *"420. Cheating and dishonestly inducing delivery of property.-Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any erson, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for an term which may extend to seven years, and shall be liable to fine."*
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> *10. The ingredients required to constitute an offence under Section 415 have been lucidly dealt with by this Court in the Case of Ram Jas v. State of U.P. (1970) 2 SCC 740, wherein this Court observed as below: (SCC p. 743, para3)*

"The ingredients required to constitute of offence of cheating are-

(i) there should be fraudulent or dishonest inducement of a person by deceiving him;

(ii)(a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or

(b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived;

and

(iii) in cases covered by (ii) (b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property."

11. While Section 415 is an offence of cheating, Section 418 deals with cheating with knowledge that wrongful loss may ensure to a person whose interest the offender is bound to protect and Section 420 is cheating and dishonestly inducing delivery of property. In order to attract the provisions of Sections 418 and 420 the guilty intent, at the time of making the promise is a requirement and an essential ingredient thereto and subsequent failure to fulfil the promise by itself would not attract the provisions of Section 418 or Section 420. Mens rea is one of the essential ingredients of the offence of cheating under Section 420. As a matter of fact Illustration (g) of Section 415 makes the position clear enough to indicate the mere failure to deliver in breach of an agreement would not amount to cheating but is liable only to a civil action for

breach of contract and it is this concept which obviously has weighed with the learned Single Judge. But can the factual situation as narrated above in the longish reproduction of the complaint lend support to the observations of the learned Judge, the answer is a pivotal one but before so doing one other aspect as regards the powers under Section 482 CrPC ought to be noticed. As noted hereinbefore this power is to be exercised with due care and caution and rather sparingly and has been so held on more occasions than one.

12. In the case of Pratibha Rani v. Suraj Kumar (1985) 2 SCC 370 this Court pointed out that the High court should very sparingly exercise its discretion under Section 482 CrPC.

13. In L.V. Jadhav v. Shankarrao Abasaheb Pawar (1983) 4 SCC 231, this Court observed: (SCC p. 240, para 10)

> *"The High Court, we cannot refrain from observing, might well have refused to invoke its inherent powers at the very threshold in order to quash the proceedings, for these powers are meant to be exercised sparingly and with circumspection when there is reason to believe that the process of law is being misused to harass a citizen."*

14. Needless to record however and it being a settled principle oflaw that to exercise powers under Section 482 of the Code, the complaint in its entirety shall have to be examined on the basis of the allegation made in the complaint and the High Court at that stage has no authority or jurisdiction

to go into the matter or examine its correctness. Whatever appears on the face of the complaint shall be taken into consideration without any critical examination of the same. But the offence ought to appear ex facie on the complaint. The observations in Nagawwa v. Veeranna Shivalingappa Konjalgi (1976) 3 SCC 736 lend support to the above statement of law: (SCC p. 741, para 5)

"(1) where the allegations made in the complaint or the statements of the witneses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

The case mentioned by us are purely illustrative and provide sufficient guidelines

in Shivalingappa case can it be said that the allegations in the complaint do not make out any case against the accused nor do they disclose the ingredients of an offence alleged against the accused or the allegations are patently absurd and inherently improbable so that no prudent person can ever reach to such a conclusion that there is sufficient ground for proceeding against the accused? In the present case, the complaint as noticed above does not, however, lend credence to the questions posed. It is now will settled and one need no dilate on this score, neither do we intend to do so presently that the allegations in the complaint will have to be accepted on the face of it and the truth or falsity of which would not be gone into by the Court at this earliest stage as noticed above: whether or not the allegations in the complaint were true is to be decided on the basis of the evidence led at the trial and the observations on this score in the case of Nagpur Steel & alloys (P) Ltd. v. P. Radhakrishna 1997 SCC (Cri) 1073 ought to be noticed. In para 3 of the Report this Court observed: [SCC (Cri)p. 1074, para 3)]

> *"3. We have perused the complaint carefully. In our opinion it cannot be said that the complaint did not disclose the commission of an offence. Merely because the offence was committed during the course of an commercial*

transaction, would not be sufficient to hold that the complaint did not warrant a trial. Whether or not the allegations in the complaint were true was to be decided on the basis of evidence to be led at the trial in the complaint case. It certainly was not a case in which the criminal trial should have been cut short. The quashing of the complaint has resulted in gave miscarriage of justice. We, therefore, without expressing any opinion on the merits of the case, allow this appeal and set aside the impugned order of the High Court and restore the complaint. The learned trial Magistrate shall proceed with the complaint and dispose of it in accordance with law expeditiously.

17. On a careful reading of the complaint, in our view, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 415, 418 and 420 cannot be said to be totally absent on the basis of the allegations in the complaint. We, however, hasten to add that whether or not the allegations in the complaint are otherwise correct has to be decided on the basis of the evidence to be led at the trial in the complaint case but simply because of the fact that there is a remedy provided for breach of contract, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy available to the appellant

herein. Both criminal law and civil law remedy can be pursued in diverse situations. As a matter of fact they

> *"are not mutually exclusive but clearly coextensive and essentially differ in their content and consequence. The object of criminal law is to punish an offender who commits an offence against a person, property or the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life. This does not, however, effect the civil remedies at all for suing the wrongdoer in cases like arson, accidents, etc. it is an anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. The two types of actions are quite different in content, scope and import".*
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> *19. Considering the factual aspect of the matter, we unhesitatingly state, however, that the issue involved in the matter under consideration is not a case in which the criminal trial should have been short-circuited. We, thus, without expressing any opinion on the merits of the case allow the appeal and set aside the impugned order of the high Court and restore the complaint. The learned trial Magistrate shall proceed with the complaint and dispose of the same in accordance with the law with utmost expedition. Be it clarified however that*

observations as above in this judgment be not taken as an expression of any opinion of ours."

11. Without expressing any opinion on the merits of the case, no case for interference under Section 482 of the Code of Criminal Procedure is made out. However, since it is a complaint case, on the surrender of the applicants, the Presiding Officer shall also consider the release of the applicants expeditiously by furnishing bail bonds to his satisfaction.

12. In view of the aforesaid, application filed under Section 482 of the Code or Criminal Procedure is dismissed.

(Rajesh Tandon, J.)

16.12.2006
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